for the purpose of injunction, will be retained until the whole controversy is decided.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 414; Dec. Dig. § 194.* 1 Va.-W. Va. Enc. Dig. 171, et seq.]

3. Boundaries (§ 3*)—Evidence—Marks on Ground.—In locating a disputed boundary line, marks on the ground are entitled to preference over courses and distances.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 3141; Dec. Dig. § 3.* 2 Va.-W. Va. Enc. Dig. 582.]

Appeal from Circuit Court, Spottsylvania County.

Action by E. M. Graves and another against Samuel Woolfolk and another. Judgment for complainants, and defendants appeal. Affirmed.

Gordon & Gordon and *S. P. Powell,* for appellants.

Carter & Carter, for appellees.

ADAMSON'S ADM'R *v.* NORFOLK & P. TRACTION CO. et al.

Jan. 12, 1911.

[69 S. E. 1055.]

1. Negligence (§ 72*)—Contributory Negligence—Sudden Peril.—One confronted with sudden peril through the fault of another is not required to exercise the presence of mind which a reasonably prudent man under ordinary circumstances must exercise.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 99, 100; Dec. Dig. § 72.* 10 Va.-W. Va. Enc. Dig. 392, et seq.]

2. Trial (§ 295*)—Instructions—Construction as a Whole.—Instructions must be read as a whole, and if, when so read, they could not have misled the jury, a verdict will not be disturbed merely because one of the instructions if standing alone was defective.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.* 7 Va.-W. Va. Enc. Dig. 743.]

3. Trial (§ 295*)—Instructions—Construction as a Whole.—Where, in an action for the death of a trolley car passenger jumping from the car onto a parallel track in front of an approaching car to avoid danger of a collision by a car running into the car on which he was riding, the theory of plaintiff was that defendant had negligently placed decedent in a perilous position, and the theory of defendant was that decedent had not been placed in a position of imminent peril, an instruction that, if decedent and defendant were both negligent and the negligence of both caused the death of decedent, the verdict must be for defendant, though the degree of negligence of defendant was greater than that of decedent, forming a part of the charge presenting the theory of defendant that, while there was a

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

slight collision between the car on which decedent was riding and the car approaching from the rear, there was no danger, real or reasonably to be expected such as to create a terror of an emergency, and leaving it to the jury to determine whether decedent was guilty of contributory negligence, and qualified by instructions presenting plaintiff's theory, was not erroneous because misleading and improper in the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.* 7 Va.-W. Va. Enc. Dig. 743.]

4. Trial (§ 295*)—Instructions—Construction as a Whole.—An instruction that every man must exercise reasonable care for his own safety, and that if plaintiff failed to prove that decedent saw the car approaching from the rear, and if he was not in danger of injury if he had remained seated, and if he jumped directly in front of the approaching car merely because he heard female passengers call out "Jump!" without stopping to think or to take any care for his safety, and if his death was caused by his reckless act, the verdict must be for defendant, properly submitted the theory of defendant, and where the court submitted the theory that decedent was not guilty of negligence, if, by the negligence of defendant, he was placed in a perilous position where he had to adopt a perilous alternative, plaintiff could not complain, since the charge is to be construed as a whole.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.* 7 Va.-W. Va. Enc. Dig. 743.]

5. Trial (§ 203*)—Instructions—Theory of Case.—Where, in a personal injury case, the evidence is conflicting on the issues of negligence and contributory negligence, it is proper to instruct on each point.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. § 203.* 7 Va.-W. Va. Enc. Dig. 704.]

6. Trial (§ 203*)—Instructions—Theory of Case.—Where two theories of a case are presented by the evidence, on one of which the jury has been properly instructed, the refusal to instruct on the other theory, which, if sustained would require a different verdict, is erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. § 203.* 7 Va.-W. Va. Enc. Dig. 707.]

7. Carriers (§ 348*)—Injuries to Passengers—Evidence—Instructions.—Where, in an action for the death of a trolley car passenger jumping from a car onto a parallel track in front of an approaching car to avoid danger of a collision by another car running into the car on which he was riding, the court charged that it was not sufficient for plaintiff to prove that decedent might have been frightened

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

and excited, but that he must prove that the circumstances created by defendant or its servants were such as to place a reasonable man under the immediate apprehension of "danger," a charge that if decedent was not in danger of being injured if he had remained seated, but that he jumped directly in front of an approaching car without stopping to take any care for his safety, the verdict must be for defendant, was not objectionable because of the use of the word "danger" instead of the words "apparent danger," as the error, if any, was cured by the other charge.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1403-1407; Dec. Dig. § 348.* 7 Va.-W. Va. Enc. Dig. 744.]

8. Trial (§§ 256, 233*)—Instructions—Statement of Issues.—An instruction properly stating the law applicable to the facts which plaintiff has pleaded and proved need not state to which count of the declaration it is applicable, in the absence of a request to that effect or a circumstance rendering it necessary.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641, 527-530; Dec. Dig. §§ 256, 233.* 7 Va.-W. Va. Enc. Dig. 727, 740.]

9. Trial (§ 233*)—Instructions—Statement of Issues.—Where, in an action for the death of a trolley car passenger jumping from the car onto a parallel track in front of an approaching car on that track to avoid danger of a collision of another car running into the car on which he was riding, the theory of plaintiff was that defendant had negligently placed decedent in a perilous position, and the theory of defendant was that decedent had not been placed in a position of imminent peril, an instruction that the basis of the action was negligence which could not be presumed from the mere fact that decedent was run over by a car, but that, before plaintiff could recover, he must prove, not only that defendant was negligent, but that it was negligent as charged in the declaration, and that the negligence charged was the proximate cause of decedent's death, was not objectionable as leading the jury to believe that the court required proof of each separate and inconsistent act of negligence contained in the distinct counts of the declaration.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 527-530; Dec. Dig. 233.* 7 Va.-W. Va. Enc. Dig. 727.]

10. Trial (§ 244*)—Instructions—Undue Prominence to Particular Issue.—The instruction was not objectionable as directing the attention of the jury to the count of the declaration charging negligence in the operation of the car which struck decedent.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 577-581; Dec. Dig. § 244.* 7 Va.-W. Va. Enc. Dig. 723.]

11. Trial (§ 295*)—Instructions—Construction as a Whole.—Where the instructions presented the law applicable to defendant's theory of the case and the qualifications necessary were explained in the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

instructions given at the request of plaintiff, and an instruction given at the request of defendant, the instructions are to be construed together, and plaintiff can not complain of the incompleteness of the instructions for defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.* 7 Va.-W. Va. Enc. Dig. 743.]

12. Carriers (§ 346*)—Injuries to Passengers—Contributory Negligence—Evidence.—In an action for the death of a trolley car passenger jumping from a car onto a parallel track in front of an approaching car to avoid danger of a collision by a car running into the car on which he was riding, evidence held not to show such negligence of defendant as to place decedent in a position of imminent peril so as to relieve him from the failure to exercise reasonable care.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1401; Dec. Dig. § 346.* 70 Va.-W. Va. Enc. Dig. 392, 411.]

13. New Trial (§ 101*)—Grounds—Newly Discovered Evidence.—To justify the granting of a new trial on the ground of newly discovered evidence, it must appear that the evidence was discovered since the trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 205, 206; Dec. Dig. § 101.* 10 Va.-W. Va. Enc. Dig. 448.]

14. New Trial (§ 102*)—Grounds—Newly Discovered Evidence.—Where a party elected to go to trial notwithstanding the absence of witnesses, who had been summoned, and notwithstanding the return of the subpœna "not found," and did not apply for a continuance on the ground of the absence of witnesses, an application for a new trial on the ground of newly discovered evidence consisting of the testimony of the witnesses wa properly denied.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 210-214; Dec. Dig. § 102.* 10 Va.-W. Va. Enc. Dig. 448.]

15. New Trial (§ 58*)—Defects in Verdict—Indefiniteness.—Where, in an action against a defendant and a codefendant, the inquiry at the trial was directed against defendant alone, and plaintiff's instructions related to defendant, a new trial would not be granted on the ground that the verdict for defendant was indefinite.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 121-124; Dec. Dig. § 58.* 10 Va.-W. Va. Enc. Dig. 461.]

Error to Circuit Court, City of Norfolk.

Action by Adamson's administrator against the Norfolk & Portsmouth Traction Company and another. There was a judgment for defendant named, and plaintiff brings error. Affirmed.

R. Randolph Hicks and *Vincent Boss,* for plaintiff in error.

Munford, Hunton, Williams & Anderson, for defendant in error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.